

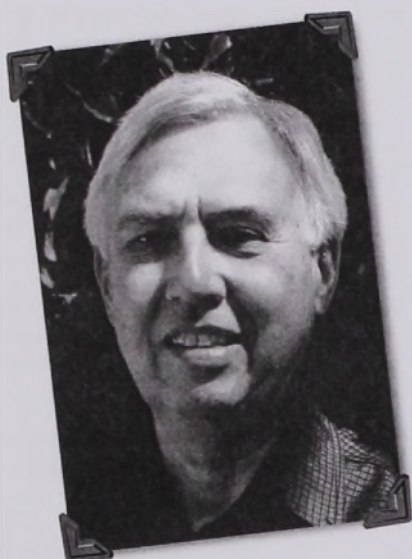


Essays in honour of  
Huldigingsbundel vir

CR Snyman

*JJ Joubert*

*Editor/Redakteur*



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University of South Africa, Pretoria  
Universiteit van Suid-Afrika, Pretoria

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# Redakteursvoorwoord ■ Editor's preface

Afgesien van enkele persoonlike bydraes oor Kallie Snyman die mens, ampsgenoot en vriend, word daar in hierdie publikasie 'n aantal vakbydraes byeengebring wat spesifiek geskryf is vir die huldigingsbundel vir Professor CR Snyman, uitnemende strafregjuris en gewaardeerde kollega in die Department Straf- en Prosesreg van die Universiteit van Suid-Afrika oor 'n tydperk van drie dekades. Tans 'n professor *emeritus* van hierdie departement, is Professor Snyman ook 'n Navorsingsgenoot van die departement en lewer hy steeds 'n beduidende bydrae tot die *corpus* navorsing van departementslede.

Die aanvoerwerk vir hierdie bundel is gedoen deur die redaksionele komitee: Professore Louise Jordaan, Sunette Lötter en Stephan Terblanche van die Departement Straf- en Prosesreg. Ek bedank hulle graag vir hul samewerking.

Thanks are due to Professor Danny Titus, former Acting Executive Dean of the College of Law and to the Publications Committee of Unisa for the means of financing the publication of these essays (and the presentation function).

The publication effort was considerably eased by the valued assistance of Ms Mariki Rudolph of the Institute of Foreign and Comparative Law of this university and Ms Hetta Pieterse of Unisa Press. Furthermore, I should like to thank Ms Alexa Barnby, Ms Jane Smith and Ms Marianne Visser of the Directorate: Language Services for their assistance in the English and Afrikaans language editing of the various contributions, and Mr Oswald Davies for his assistance in the language editing of the article in German.

A special word of thanks to all those (colleagues and others, nationally and internationally) who have collaborated with Professor Snyman during his career and made contributions to this publication – the fruits of which will be a lasting tribute to Kallie Snyman.

JJ Joubert

Editor

Head: Department of Criminal and Procedural Law

July 2007



# Preface

Rita Maré\*

Professor Kallie Snyman is without doubt *the* most prominent scholar in Criminal Law who has ever been attached to Unisa. His contribution to the debate around contentious issues in criminal law and ultimately on the development of criminal law theory and criminal law practice in South Africa is immeasurable.

Professor Snyman's publications are indeed impressive. The Afrikaans edition of his textbook *Strafreg/Criminal Law* saw its fifth edition in 2006. This major work is supplemented by two books namely *Misdade betreffende afhanklikheidsvormende misdade* (1974) and *A draft criminal code* (1995) as well as numerous chapters in books and more than forty articles in accredited journals. Assessing Professor Snyman's impact on South African law on the basis of these numerous publications and contributions is such an immense task that it may in itself be the subject of a thesis in years to come!

I am convinced that Professor Snyman himself would regard his work on the normative theory of culpability as one of his major contributions to the development of criminal law in South African law. Based on German legal theory, the normative theory of culpability regards culpability as an evaluation of the offender's intention or will. According to this theory an offender whose unlawful conduct and state of mind comply with all the elements of a crime can, in the words of Professor Snyman in *Criminal law* (4ed 2002) at 153, only be blamed if he acted 'in circumstances under which the law could fairly have expected him to act differently, namely to refrain from proceeding with his unlawful act'. The application of this theory of culpability offers a basis for finding an accused who intentionally killed another under coercion not guilty without recognising such coercion as a ground of justification excluding the unlawfulness of the act. Professor Snyman also pointed out that the application of the normative theory of punishment would also limit the defence of mistake of law, recognised in *S v De Blom* 1977 3 513 (A), in that only unavoidable or unreasonable mistakes of law would be a defence.

The normative theory of culpability received some recognition in cases such as *S v Goliath* 1972 3 SA 1 (A), *S v Bailey* 1982 3 SA 772 (A) and *S v Mandela* 2001 1 SACR 156 (C) and sparked a lively debate in academic circles. (See for example Van Oosten 1995 THTHR 361 and 568.)

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\*Vice Principal: Academic and Research, University of South Africa.

One of Professor Snyman's first contributions to criminal law in South Africa is probably his doctoral thesis on theft in South Africa, accepted in the early 1970s by the then University of the Orange Free State. In this thesis he argued that the act of theft should be defined as an act of appropriation and not as a *contrectatio*, a term favoured by the courts at that stage. He correctly pointed out that the term *contrectatio* originally referred to a handling or touching of the object of theft, and that this view of the act of theft was inappropriate in a modern economy. His excellent exposition and explanation of an act of appropriation, namely an act which deprives the lawful owner or possessor of his property and whereby the thief himself exercises the rights of an owner in respect of the property, paved the way for the courts in a number of cases to accept that the act of theft is more than a mere handling of an item and provided a sound basis to distinguish between a completed theft and an attempted theft. His systematic analysis of the crime of theft, as is evident in his textbook *Strafreg/Criminal Law* went a long way toward demystifying and clarifying this complex crime for students, researchers and legal practitioners.

Other areas of note to which Professor Snyman made important contributions are the structure of criminal liability with the introduction of the concept of the definitional elements of a crime; the principle of legality with the introduction of the five Latin phrases of *ius acceptum*, *ius certum*, *ius praeivum*, *ius strictum* and *nulla poena* to explain this theoretical concept; the law relating to *aberratio ictus* with the criticism against the so-called 'doctrine of transferred intent'; causation in law with the promotion of the causal theory of causation; the law relating to criminal liability for omissions, private defence, putative crimes, mistake and participation as well as the law relating to the crimes of contempt of court, incitement and assault.

An excellent feature of the later editions of *Strafreg/Criminal Law* is the detailed incorporation and discussion of the impact of the Bill of Rights and the Constitution on substantive criminal law. Noteworthy aspects are the impact of the Bill of Rights on the principle of legality and crimes with vague definitions.

Though Professor Snyman followed a theoretical, dogmatic and scientific approach to criminal law, he also firmly believed that criminal law should serve and protect society. He openly propagated a deviation from the dogmatic approach in instances where he believed that dogmatism would not serve the interests of society. He was critical of the recognition of the defence of mistake in law in *S v De Blom*, *supra*, the recognition of voluntary intoxication as a complete defence in *S v Chretien* 1981 1 SA 1097 (A) and the recognition of the defence of non-pathological criminal incapacity in *S v Campher* 1987 1 SA 940 (A) and *S v Wiid* 1990 1 SACR 561 (A). Professor Snyman thus welcomed the creation of the offence of 'statutory intoxication' in the Criminal Law Amendment Act 1 of 1988 and the erosion of the defence of non-pathological



intoxication in *S v Eadie* 2002 1 SACR 663 (SCA). Professor Snyman is also one of a few legal academics who propagates the reinstatement of the death penalty. In *Criminal Law* 4ed 29 he states that the judgment in *S v Makwanyane* 1995 3 SA 391 (CC); 1995 2 SACR 1 (CC), in which the death sentence was abolished as unconstitutional, had been catastrophic for the country. He believes that the high murder rate in the country justifies an amendment to the Constitution to reinstate the death penalty, which he believes will go a long way toward protecting society against violent crimes.

Professor Snyman's research and scholarly work is of such a high quality that it is no wonder that he was honoured by the FAK for the Afrikaans edition of *Strafreg* and received the Chancellor's Prize from Unisa as the best senior researcher.

Like the true scholar and academic he is, Professor Snyman never required his colleagues to agree with him on his views on criminal law or any other issue for that matter. As a colleague he was always willing and prepared to listen to opposing views and to debate issues. I fondly remember many discussions and debates in the tearoom on issues such as accomplice liability for murder, the doctrine of common purpose, causation and the normative theory of culpability.

Professor Snyman's enthusiasm for the discipline of criminal law is clearly reflected in his tuition of the subject at Unisa. He was course leader of undergraduate and postgraduate modules on criminal law. The management and quality of all these modules were excellent. The slogan 'students come first', coined by Unisa in 2006 as part of the drive to improve service delivery in the institution, was in effect practised by Professor Kallie Snyman for many years. Students and their academic needs were important to Kallie, and he was always prepared to walk the extra mile to ensure that students understood the intricacies of criminal law. When, in the early 1990s, Unisa introduced the team approach to the development of study material, involving educationalists, curriculum designers, graphic designers and editors, many academics refused or were reluctant to adopt this approach, fearing that 'outsiders' would prescribe to them what their study material should contain. Kallie, however, volunteered his criminal law course as the pilot project for the Department of Criminal and Procedural Law. The first experience of converting what was essentially a text book into open distance learning study material could not have been an easy process. I can still recall the numerous meetings Kallie and his team had and the endless discussions on how the material should be designed. Even Kallie was despondent at times. However, the study package created during that process – as refined in similar processes later – is in my view one of the best study packages at Unisa. As Head of the Department of Criminal and Procedural Law and as Executive Dean of the College of Law, I had very positive feedback from students on the criminal law modules. When Unisa applied for accreditation



from the DETC (Distance Education and Training Council of the USA) during the time I was Head of the Department, I submitted the criminal law guides for evaluation to the inspectors. Although they were quite critical of some other study packages submitted to them, they were extremely positive and complimentary about the criminal law guides.

Professor Snyman played an important mentorship role in the Department of Criminal and Procedural Law. During my first years at Unisa he would often walk into my office with a Law Report in his hand, telling me that he had just read this very interesting case and suggesting that I write a case discussion, at the same time offering to read and comment on the discussion when concluded. That was how some of my first publications saw the light of day.

A number of academics had the privilege of having their academic careers shaped under the guidance of Professor Snyman as members of his criminal law team. I think especially of Dr Tertius Geldenhuys (now with SAPS), Mr Abel Ramolotja, Mr Loutjie Coetzee and what Kallie used to call 'die meisies' (the girls), namely Professor Sunette Lötter, Professor Louise Jordaan and Professor Karin Alheit. I am convinced that 'the girls' formed the backbone of the criminal law team. Whenever there was a specially daunting, difficult or urgent task to be performed, Kallie, on a number of occasions, was heard to say that 'the girls' would complete the task in no time.

I have referred to the role Professor Snyman played at Unisa as a scholar, researcher, law teacher and mentor. Kallie Snyman is much more than that. He is a friend to all his colleagues, a true and refined gentleman, a connoisseur of music, art and films, a musician in his own right and with his wife Fernanda at his side, the perfect host. Who will forget the wonderful piano duet Kallie and Fernanda played on one occasion when they entertained the criminal law team at their home?

Professor Johan Joubert and the colleagues of the Department of Criminal and Procedural Law should be commended for their initiative in honouring Prof Kallie Snyman with this publication.

# Carel Rainier Snyman, juris, akademikus, mens: 'n woord van waardering

SA Strauss\*

## Summary

This is a brief word of appreciation of the work of Professor CR ('Kallie') Snyman, professor *emeritus* of law of the University of South Africa, contributed by SA Strauss, a former colleague and friend of Professor Snyman, and of his wife, Mrs Fernanda Snyman.

Mention is made of how Snyman and Strauss first became acquainted when the former was lecturer in Criminal Law at Rand Afrikaans University in Johannesburg and the latter rendered services there as second examiner. In 1975 Snyman joined the Department of Criminal and Procedural law of which Strauss was the head. Soon Snyman started specialising in Criminal Law. He published a substantial number of articles in legal journals and became an outspoken protagonist of the codification of South African criminal law. In 1995 he published a draft criminal code for South Africa.

His *magnum opus* was a substantial handbook on criminal law which was first published in 1981 in Afrikaans. Soon thereafter an updated English version of the book appeared. The fifth edition of the Afrikaans version was published in 2006 and the fourth edition of the English version in 2002. The book has become a leading work in this field in South Africa, both as textbook in law schools and as handbook in the criminal courts. A special feature of the work is the extent to which it reflects contemporary juristic thought in Continental jurisdictions as well as Common Law jurisdictions. It also contains many references to Roman-Dutch legal sources that form the basis of South African common law.

Special tribute is paid to Mrs Fernanda Snyman, who has worked for many years in the Language Services Department at Unisa, specialising in legal terminology and editorial style.

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Dit is vir my werklik 'n eer en 'n voorreg om 'n kort woord van waardering tot die inhoud van hierdie bundel by te dra.

---

\*Professor *emeritus* in regte en voormalige hoof (1960–1979), Departement Straf- en Prosesreg, Universiteit van Suid-Afrika.



Ek het Kallie Snyman, soos hy algemeen bekend is, leer ken kort nadat hy aangestel is as senior lektor aan die Randse Afrikaanse Universiteit (RAU), onlangs herdoop tot die Universiteit van Johannesburg.

Die RAU het teen die middel van die jare 60 van die vorige eeu tot stand gekom as 'n doelbewuste kultureel-politieke daad van die destydse sterk regering van die Nasionale Party. Die Universiteit se eerste – en hoogs bekwame, doelgerigte en dinamiese – rektor was professor Gerrit Viljoen, vroeër professor in klassieke tale aan die Universiteit van Suid-Afrika, en 'n man wat onder sy vele kwalifikasies ook nog die graad LLB agter sy naam kon skryf.

RAU se begindae was beskeie. Die Universiteit, befonds deur sowel die staat as die private sektor, het die taamlik gehawende gebouekompleks van 'n groot bierbrouery wat na 'n ander, groter en hoogs moderne fabriekskompleks verhuis het, oorgeneem en betrek.

Rektor Viljoen se eerste groot taak was om akademiese en administratiewe personeel te werf om die universiteit te beman. Daar is op 'n groot skaal visgevang in die akademiese waters van Unisa, wat self toe in 'n ongeëwenaarde groeifase was. Professor Willem Joubert, destyds dekaan van ons regs fakulteit, moes met 'n seer hart afskeid neem van bekwame jong dosente soos Johannes van der Walt, Schalk van der Merwe, Giel Reynecke, George Barrie en andere.

In sy begindae kon die RAU egter nie die mas opkom met sy eie, pasaangestelde personeel nie, maar moes ook nog tydelik en ad hoc die dienste aankoop van personeel van ander Afrikaanssprekende dosente verbonde aan Unisa, die Universiteit van Pretoria en die Potchefstroomse Universiteit vir Christelike Hoër Onderwys. RAU het voortgegaan om vaste personeel elders te werf, en so het dit dan gekom dat CR Snyman, advokaat in Bloemfontein, in 1970 gewerf is. Spoedig ná sy aankoms by RAU, waarvan die studentetal gou begin groei het ná sy totstandkoming, is Snyman betrek as dosent in Strafrecht. Deel van die take waarmee ek destyds by RAU versoek is om te help, was om as eksterne eksaminator te dien, in besonder by die afneem van mondelinge eksamens. So het dit toe gekom dat ek as taamlike senior van Kallie saam met hom by eksamens moes sit.

Nou moet ek eers hier afwyk van my verhaal en sê dat ek op 'n vroeë leeftyd reeds ontdek het dat benewens talle moontlike klassifikasies, mense in twee groepe verdeel kan word: dié mense – en hulle is 'n oorweldigende meerderheid – wat eers praat en dan dink, en diegene wat eers dink en dan praat. Ek het Kallie Snyman kategorieë by laasgenoemde groep ingedeel. Laat my ook verder sê dat die hoë presteerders oorweldigend uit laasgenoemde groep kom.

Teen die tyd dat ek Snyman leer ken het, was ek reeds meer as 20 jaar met die reg en regsweese doenig sedert ek in 1949 in die regte begin studeer het. Dit was vir my spoedig duidelik dat hierdie stil jongman sy loopbaan ernstig bedryf het en groot potensiaal aan die dag gelê het. Met alle eerbied gesê, het ek begin wonder of sy kollegas aan die RAU hom regtig na waarde skat. Moontlik was 'n faktor die feit dat hy oënskynlik nie sy doktorsale studie kon afhandel nie. Ek sê 'oënskynlik', want hy het my op 'n stadium vertroulik meegedeel dat sy promotor – 'n vooraanstaande Vrystaatse juris, nou reeds lankal oorlede – helaas vanweë stadspolitiese bedrywighede gladnie by sy konsepverhandeling kon uitkom nie! Hoe dit ook al sy, en ek sny 'n lang storie kort, na aanleiding van gesprekke tussen hom en my het hy in 1974 nog as senior lektor by Unisa aansoek gedoen om 'n vakante betrekking en 'n aanbod ontvang vir aanstelling in die departement waarvan ek destyds hoof was. In 1973 is sy doktorsale verhandeling uiteindelik gefinaliseer en in 1975 het hy professor in Straf- en Prosesreg geword.

Ek kies my woorde nou baie versigtig in die stelling wat volg: ek was vir 20 jaar lank hoof van die departement – 1960 tot 1979 – en was sedertdien nog betrokke as lid van keurkomitees vir baie jare. In al daardie jare het ons in daardie departement geen beter aanstelling gemaak of geen verdiensteliker kandidaat tot professor bevorder as CR Snyman nie. Dit was ook gou duidelik dat die opset by Unisa hom soos 'n handskoen gepas het. Hy kon die primêre taak van 'n dosent verrig, maar kon hom ook deurlopend laat geld by wyse van navorsing en skryfwerk.

Die dae van publiseer om geldelike toelaes vir jou departement te verdien het toe nog nie aangebreek nie. Dit was grootliks 'n geval van soos Goethe dit gestel het in 'n beroemde gedig: *'Ich singe wie ein Vogel der in den Zweigen wohnt. Das Lied das mir aus der Kehle dringt, ist Lohn der reichlich lohnt.'* Snyman se publikasies, sy dit omvangryke artikels, vonnisbesprekings, korter aantekeninge of boeke, was deur die bank van hoë gehalte. Boweal getuig sy werke van deeglike navorsing, indringende denke en die hoogste gehalte. Sy betoog vir die kodifikasie van die strafreg in Suid-Afrika is besonder oortuigend en sy *Draft Criminal Code for South Africa* (1995) is 'n 'moet lees'.

Sonder twyfel is sy *magnum opus* sy handboek oor *Strafreg* wat in 1981 die lig gesien het en herhaaldelik in hersiene weergawes gepubliseer is; die jongste is die vyfde uitgawe van 2006. Hy het die boek in Engels vertaal en die vertaling het reeds vier uitgawes beleef, die jongste in 2002. Die strafreg was in 1981 reeds 'n deeglik beskrewe deel van ons reg. In 1917 het Gardiner en Lansdown se *South African criminal law and procedure* die lig gesien. Die werk het vir dekades die toneel oorheers. Teen die tyd dat die sesde (en laaste) uitgawe van hierdie steeds groter wordende werk in 1957 die lig gesien het – in twee bande wat in toto 2 029 bladsye beslaan het – sou geen regspraktisyn dit in 'n strafhof



gewaag het sonder dié werk nie. Die werk het egter vanaf sy eerste verskyning sterk aangeknoop by die Engelse reg en was bowendien grootliks 'n kompilasie van wettereg en gewysdes.

Intussen, in 1949, het professore JC de Wet en HL Swanepoel se *Strafreg* – een van die eerste regshandboeke in Afrikaans – verskyn. Dit was die eerste regswetenskaplike werk oor die strafreg in Suid-Afrika. Die skrywers het die Romeins-Hollandse reg deeglik erkenning gegee. Boonop het veral Prof JC sterk aangeknoop by die hoogstaande Duitse strafregwetenskap. Daarby het hy op sy kenmerkende satiriese wyse talle regters, van Lord de Villiers tot regters wat in 1949 nog op die regbank gesit het, skerp gekritiseer. Prof JC se studente op Stellenbosch het hom aanbid en sy *Kontraktereg en handelsreg* (met medeskrywer James Yeats) sowel as sy *Strafreg* feitlik uit hul koppe geleer. Regspraktisyns en regters wou aanvanklik weinig van dié twee werke weet, maar die skrywers se goed gedokumenteerde kritiek het mettertyd deeglik inslag by die houe gevind.

Toe die eerste band van 'n sogenaamde heruitgawe van Gardiner en Lansdown, met outeurs van die eerste band professor EM (Exton) Burchell en twee medeskrywers, in 1970 die lig sien, was dit inderdaad 'n splinternuwe werk wat weinig van die kompilariese kenmerke van die ou werk vertoon het en sterk aangeknoop het by meer moderne gedagterigtings soos vervat in De Wet en Swanepoel en die tydskrifartikels van 'n moderne geslag regsryers. Teen die einde van die 20ste eeu is die strafreg te lande oorheers deur twee werke: dié van Snyman en die derde uitgawe (ten dele) van Burchell en Hunt (laasgenoemde 'n medeskrywer van dié 1970-reeks). Intussen het 'n meer akademies gerigte, enkelbandige boek *Principles of criminal law* deur JM (Jonathan, seun van Exton) Burchell en Milton ook nog in die vroeë 1990s verskyn, met 'n tweede uitgawe in 1997. Voorts moet melding gemaak word van die derde uitgawe van De Wet en Swanepoel in 1975, deur Prof JC – nou reeds professor *emeritus*, en alleensrywer van dié uitgawe omdat prof Swanepoel intussen oorlede is. Helaas het die derde uitgawe van hierdie gewilde baanbrekerswerk nie goeie resensies in die regstydskrifte ontvang nie, en in die strafregspiegeling op die agtergrond getree.

Vanweë die geweldige omvang van die strafreg-wetgewing, regspraak en juristestandpunte oor haas alle fasette, verg dit groot dissipline van handboekskrywers om hul werke binne redelike perke te hou: om te veralgemeen, onder 750 bladsye. Daar is deesdae nog die faktor van ellelange betoë oor menseregte wat in besonder sedert ons nuwe grondwet feitlik mode geword het. Die reg betreffende menseregte – *human rights law* – het vir sommige juriste en pseudo-juriste feitlik 'n nuwe soort godsdiens geword. Standpunte word deur sommige skrywers verkondig wat weinig verband hou met die werklikheid en die eise van 'n veilige, ordelike samelewing. Teen die

tyd dat die regte van wrede, genadelose misdadigers groter aandag geniet as die belange van 'n ordelike samelewing, behoort rooi waarskuwingsligte te flikker.

Snyman gee in sy werk erkenning aan ons grondwetlike Handves, maar op 'n gebalanseerde wyse. Vandag, aan die begin van die 21ste eeu, staan sy boek oor strafreg op die voorgrond as 'n werk van die hoogste gehalte, beskikbaar in twee landstale, en bowendien as die grootste Suid-Afrikaanse stuk werk op dié gebied as geheel wat tot dusver uit die pen van 'n enkele juris gevloei het. Die boek is nie slegs aanvaar as 'n ideale handboek vir studente nie, maar as ware *vade mecum* vir sowel regspraktisyn as regterlike beampte. 'n Groot verdienste van sy werk is dat terwyl De Wet se pionierswerk die begin verteenwoordig van erkenning te lande aan Duitse strafregswetenskaplike denke van die vroeë 20ste eeu, Snyman se werk algehele vernuwing gebring het deur ons strafregdenke in lyn te bring met die jonger Vastelandse regswetenskap. Dit het vanselfsprekend nie net 'n teoretiese of sisteembouende uitwerking nie, maar bring ook vernuwende praktiese resultate. Snyman het ook geput uit moderne Engelse, Skotse en Amerikaanse regsdenke. Dit was 'n uitdaging om uit 'n oewerlose oseaan betekenisvolle en tersaaklike sienings na Suid-Afrika te bring.

Snyman se werk is nie net vanuit sy Unisa-kantoor en sy studeerkamer gelewer nie. Hy het talle besoeke aan oorsese universiteite en navorsingsinstitute gebring. Dit was veral in Duitsland waar hy navorsing gedoen het, maar hy het ook akademies gaan put uit kennisbronne in Skotland en die VSA.

En nou het ek nog nie eers gekom by Kallie Snyman as kollega en vriend nie! Ek volstaan daarmee om te sê dat dit moeilik is om veel name te noem van mense op wie 'n mens so kan staatmaak as hardwerkende en betroubare kollega – en as lojale vriend – as Kallie. Wel het ons deur die jare nie mekaar se drumpels deurgetrap nie – ons was albei baie bedrywige mense – maar die stewige band van vriendskap was altyd daar. 'n Karaktereienskap van Kallie Snyman is dat hy stil van aard is en jy nooit 'n woord van kwaadwilligheid teenoor kollegas en prominente mense in die samelewing uit sy mond sal hoor nie. Ten spyte van sy steeds groeiende status as akademikus was daar nooit enige sweem van verwaandheid of grootdoenerigheid by hom nie. Hierdie swygsame akademiese reus het rustig sy gang gegaan, vriendelik en korrek teenoor almal met wie sy pad gekruis het.

En dan het ons nog nie eens by die belangrikste persoon gekom nie! Sy is mevrou Fernanda Snyman. Min het ons geweet, toe Kallie in 1975 by ons departement te Unisa aansluit, welke juweel hom vergesél het. Spoedig het ons haar leer ken as 'n staatmaker tuisteskepper, uitnemende gasvrou, talentvolle musikus – nes Kallie – maar bowenal 'n taalkundige wat deur die jare heen ontsaglik veel waarde sou toevoeg tot Unisa-studiemateriaal wat die kern van onderrig by dié universiteit uitmaak. Ek weet dat sy haar laat geld het vanaf dag



een. Haar taalvaardigheid met Afrikaans sowel as Engels, haar arbeidsaamheid, haar hulpvaardigheid, haar wye kennis, haar perfeksionisme ... waar hou ek op? As jy hierdie woorde lees, Fernanda, moet jy weet dat dit diep uit die hart kom van 'n man wat 'n groot ereskuld teenoor jou het vir wat jy vir hom oor baie jare heen beteken het. Self gesteld op goeie taalgebruik en 'n soort amateurtaalkundige, was daar baie dae dat ek met 'n eie geskrif of dié van 'n kollega voor my gesit het en dan in my binneste die kreet van die Psalmdigter geopper het: Heer, waar dan heen? Dan het ek maar die draad na jou geslaan – soms selfs teësinning, maar in wanhoop, na jou woonhuis. En nooit, ja nooit het jy my 'n onwillige oor gegee nie! Daarvoor bly ek jou dankbaar vir solank ek leef – en ek is seker daar is talle ander kollegas wat presies net so voel.

# Carel Rainier Snyman: enkele biografiese notas

## Curriculum vitae

17 Desember 1940: Gebore op Barkly-Oos

1947: Begin skoolopleiding in Calvinia

1958: Slaag matriek aan die Hoërskool Sentraal, Bloemfontein

1961: Behaal BA (Regte) aan UOVS

1963: Behaal LLB aan UOVS

1962–1963: Regtersklerk van Regter S Hofmeyr in die Hooggeregshof, Bloemfontein

1964–1969: Praktiseer as advokaat aan die Vrystaatse balie in Bloemfontein

1970–1974: Senior lektor in Publiekreg, Randse Afrikaanse Universiteit, Johannesburg

1973: Behaal LLD aan UOVS op grond van 'n proefskrif wat handel oor die misdaad diefstal

1975–2005: Professor in die Department Straf- en Prosesreg aan Unisa

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Op 5 Julie 1969 getroud met Fernanda Malherbe in Bloemfontein

Twee kinders, 'n seun (Rainier) gebore in 1971 en 'n dogter (Marina) gebore in 1972

Eerste keer oorsee vir twee maande in Desember 1973 en Januarie 1974 by die Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg, Duitsland

In 1977 elf maande navorsing by dieselfde instituut met behulp van 'n beurs van die Alexander von Humboldtstigting in Duitsland



1982–1983 verdere elf maande navorsing by dieselfde instituut danksy, onder meer, dieselfde Von Humboldtbeurs

Daarna by verskillende geleenthede vir korte tydperke navorsingsbesoeke aan oorsese universiteite, onder meer UCLA in San Francisco, Edinburgh, München, Regensburg, Bonn, en by die Freie Universität in Berlyn

## Lys van publikasies

### A BOEKE:

*Misdade in verband met afhanklikheidsvormende medisyne* (Butterworths, Durban 1974).

*The law of South Africa* volume 6, *Criminal law*. Ek is een van verskeie skrywers van hierdie boek. Ek het omtrent 'n derde van die boek geskryf

*Strafreg* (1 uitg Butterworths, Durban, 1981. Hierdie boek beleef verskeie latere uitgawes. Die vyfde uitgawe is in 2006 gepubliseer)

*Criminal law* (1 uitg Butterworths, Durban, 1984. Hierdie boek beleef eweneens verskeie later uitgawes. Die vierde uitgawe is in 2002 gepubliseer)

*Strafregvonnisbundel / Criminal law case book* (1 uitg Juta en Kie, Kaapstad. 1991 en die derde en jongste uitgawe in 2003)

*A draft criminal code for South Africa* (Juta en Kie, Kaapstad 1995)

*Werkboek vir strafreg* (1 uitg 1989. Die tweede uitgawe word in 1994 gepubliseer)

*Workbook for criminal law* (1 uitg 1989. Die tweede uitgawe word in 1994 gepubliseer)

### B ARTIKELS, AANTEKENINGE EN VONNISBESPREKINGS

'Die verweer van regsdwaling by opsetmisdade: 'n regsvergelykende studie' 1968 *Responsa Meridiana* 131

'Opsetlike strafbare manslag?' 1971 *THRHR* 184

'Die regsbelange beskerm deur die misdaad abduksie' 1972 *THRHR* 265

'Die begrippe *contractatio* en *animus lucri faciendi* in die Romeinse reg' 1973 *Acta Juridica* 271

'*Mens rea* in drug offences – onus of proof' 1973 *SALJ* 222

Vonnisbespreking: '*S v Rabson*' 1973 *THRHR* 185

Vonnisbespreking: '*S v Goncalves*' 1974 *THRHR* 315

'Die toe-eieningsbegrip by diefstal' 1975 *THRHR* 29

- 'The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and the continental systems' 1975 *CILSA* 100
- 'Watering the dagga pot plant: an uncertain reward' 1975 *SALJ* 372
- 'Die vermoëns misdade in die lig van die eise van die moderne samelewing' 1977 *SASK* 11
- 'Laying a false criminal charge' 1978 *SALJ* 454
- 'The "finalistic" theory of an act in criminal law' 1978 *SASK* 3; 136
- 'Die misdaad hoogverraad heroerweeg' 1979 *De Jure* 167
- 'The normative concept of mens rea – a new development in Germany' 1979 *International and Comparative Law Quarterly* 211
- 'The "finalistic" theory of an act in criminal law' (1) 1979 *SASK* 3
- 'The "finalistic" theory of an act in criminal law' (2) 1979 *SASK* 136.
- 'Sedition revived' 1981 *SALJ* 14
- 'Vrywillige terugtrede as 'n verweer op 'n aanklag van poting om 'n misdaad te pleeg' 1980 *SASK* 189
- 'Vrywillige terugtrede as 'n verweer op 'n aanklag van poging' 1981 *SASK* 189
- 'Die invloed van Engelse en Duitse reg op die Suid-Afrikaanse strafreg' 1981 *De Jure* 148
- 'Die misdaad sameswering' 1984 *SASK* 3
- 'The history and rationale of criminal conspiracy' 1984 *CILSA* 65.
- 'The attack on German criminal legal theory – a retort 1985 *SALJ* 130
- 'Die trouvereiste by die misdaad hoogverraad' 1988 *SASK* 1
- Vonnisbespreking: '*S v Molubi* 1988 (2) SA 576 (B)' 1988 *SASK* 457
- Vonnisbespreking: '*S v Harber* 1986 (4) SA 214 (T)' 1988 *De Jure* 150
- 'Minagting van die hof en vonnisbesprekings van beslissings waarin 'n appèl hangende is' 1988 *THRHR* 233
- 'Die verweer van nie-patologiese ontoerekeningsvatbaarheid' 1989 *TRW* 1
- '*Dolus eventualis* in the offences of terrorism, subversion and sabotage' 1990 *SALJ* 365
- 'Die misdaad *crimen laesae majestatis*' 1990 *THRHR* 259
- 'Normatiewe skuld en redelik verwagbare gedrag' 1991 *THRHR* 4
- 'Provokasie as 'n algehele verweer in die strafreg' 1991 *Consultus* 35
- 'Opmerkings omtrent die legaliteitsbeginsel in die strafreg' 1991 *THRHR* 629
- ''n Koel ontvangs vir die misdaad "statutêre dronkenskap"' 1991 *TSAR* 504
- 'Dwaling aangaande die oorsaaklike verloop' 1991 *SASK* 50
- 'Professor De Wet se statuut as 'n regsvergelijkende juris' 1991 *SASK* 136
- 'Wanneer die doodvonnis vir moord opgelê kan word' 1992 *Julie Servamus* 59
- Vonnisbespreking: '*S v Bazzard* 1992 (1) SASV 302 (NK)' 1992 *SAS* 335
- 'Reforming the law relating to housebreaking' 1993 *SAS* 38
- Vonnisbespreking: '*Amalgamated Beverage Industries Natal v City Council of Durban* 1992 2 SASV 183 (N)' 1993 *THRHR* 132
- 'The definition of proscription and the structure of criminal liability' 1994 *SALJ*



- 'Confusion concerning the defence of ignorance of the law' 1994 *SALJ* 1
- 'Vermoedelike toestemming as regverdigingsgrond in die strafreg' 1996 *THRHR* 399
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- 'Zum Entwurf eines Strafgesetzbuchs für Südafrika' 1997 *Zeitschrift für die gesamten Strafrechtswissenschaft* 434
- 'Potensiële nadeel by bedrog' 1997 *THRHR* 691
- 'Toestemming in die strafreg – 'n omskrywingsgrond of 'n regverdigingsgrond?' 1998 *De Jure* 332
- 'Nuwe lig op die handelingsvereiste by diefstal' 1998 *TSAR* 118
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- 'Die statutêre misdaad van deelname aan 'n kriminele bende' 1999 *SAS* 213
- 'Codifying the criminal law: the Australian experience' 2000 *SAS* 214
- 'Strafbarkeit juristischer Personen aus angelsächsischer und südafrikanischer Sicht' in *Krise des Strafrechts und der Kriminalwissenschaften? Tagungsbeiträge eines Symposiums der Alexander von Humboldt-Stiftung Bonn-Bad Godesberg, veranstaltet vom 1. bis 5. Oktober 2000 in Bamberg* 225
- 'Die herlewing van vergelding as regverdiging vir straf' 2001 *THRHR* 218
- 'Broadening the scope of statutory *furtum usus*' 2001 *SAS* 217
- Vonnisbespreking: '*S v Mani*' 2002 *SAS* 363
- 'Voorwaardes vir strafregtelike aanspreeklikheid buite onreg en skuld' 2002 *TSAR* 139.
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- 'The tension between legal theory and policy considerations in the general principles of criminal law' 2003 *Acta Juridica* 1
- 'Geregverdigde doodslag by inhegtenismening: die bepalinge van die nuwe artikel 49 van die Strafproseswet' 2004 *Stellenbosch Law Journal* 536
- 'The two reasons for the existence of private defence and their effect on the rules relating to the defence in South Africa' in 2004 *SAS* 178
- 'Private defence in criminal law – an unwarranted raising of the test of reasonableness' 2004 *THRHR* 325.
- 'Die geweldsbegrip by die misdaad aanranding' 2004 *TSAR* 448
- Vonnisbespreking: '*S v Saffier* 2003 1 SASV 141 (SOKPA) en *S v Kimberley* 2004 2 SASV 38 (OK)' 2005 *De Jure* 176
- 'Die misdaad uitlokking (1)' 2005 *THRHR* 428
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- 'Dogmatism vs pragmatism in South African criminal law' *Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag* 845
- 'Opmerkings oor die algemene misdaad korrupsie in die nuwe Korrupsiewet van 2004' *Gedenkbundel vir Labuschagne* 1

‘Die erkenning van objektiewe faktore by die verweer van provokasie in die strafreg’ 2006 *Tydskrif vir Regswetenskap* 57

‘Die begrip “besit” in die Strafrege’ (1) (aanvaar vir publikasie in *THRHR* 2007)

‘Die begrip “besit” in die Strafrege’ (2) (aanvaar vir publikasie in *THRHR* 2008)

## Lewensloop

Tussen 1940 en 1945 neem my pa, wat ’n polisie-offisier was, deel aan die Tweede Wêreldoorlog en word krygsgevangene geneem. Tydens hierdie oorlogsjare woon ek en my twee sussies saam met my ma by familie in Cradock. Na my pa in 1945 terugkeer van die oorlog, word hy verplaas na Calvinia, waar ons omtrent drie jaar bly. Ek begin my skoolopleiding daar. In 1948 verhuis ons na Bloemfontein, waar ek my laerskoolopleiding aan die President Brandlaerskool voltooi en daarna my hoërskoolloopbaan in 1958 aan die Sentrale Hoërskool.

Vanaf 1959 tot 1961 studeer ek aan UOVS en woon drie jaar in universiteitskoshuise, eers die Reitzsaalkamerwonings en daarna in die Huis Malberbe. Gedurende die twee jaar waarin ek my LLB-studie onderneem, woon ek in die stad en loop aandklasse by die universiteit. Destyds was al die klasse vir LLB slegs in die aand aangebied. Gedurende hierdie twee jare werk ek in die Hooggeregshof as regtersklerk van Regter S Hofmeyr.

Vanaf 1964 tot 1969 praktiseer ek as advokaat aan die Vrystaatse balie. Doen meestal strafhofwerk, en gaan dikwels op rondgaande hof in die Vrystaat. Ek het ook in ’n aantal sake in die Appèlhof in Bloemfontein verskyn. Destyds was dit die ‘lot’ van junior advokate in Bloemfontein om *pro Deo* sake in die Appèlhof te moet argumenteer.

Na my huwelik, in 1969, met Fernanda kry ek koue voete vir die advokaatswerk en besluit om liever tot die regsakademie toe te tree. Ek het gevoel ek is meer in die wieg gelê vir die regsteorie as die regspraktyk. Ek kry ’n pos as senior lektor in Publiekreg aan wat destyds bekendgestaan het as die Randse Afrikaanse Universiteit. Die regs fakulteit daar het toe bestaan uit slegs omtrent agt lede.

Grootliks deur die ondersteuning en medewerking van Professor Sas Strauss word ek vanaf die begin van 1975 aangestel as Professor in Straf- en Prosesreg aan UNISA. Toe ek by die departement begin werk het, was daar, as ek reg onthou, slegs so ses of sewe dosente in die departement: Sas, wat departementshoof was, André Rabie, wat kort daarna ’n professoraat by Stellenbosch aanvaar het, Cor Eckhardt (wat sedertdien na Nieu-Seeland verhuis het) John Middleton, Jannie van Rooyen, en Johan Joubert. Al drie laasgenoemde het later departementshoof geword. Kort daarna het Chris



Schmidt vanaf die departement Staats- en Volkereg na ons departement oorgekom, asook Peet Bekker vanaf Tukkies.

Aanvanklik het ek Siviele Prosesreg en Kommunikasiereg aangebied, maar kort daarna het ek begin om Strafrege aan te bied. Dit was aangename jare en die samewerking in die departement was, soos nog altyd daarna, baie goed. Ek onthou hoe ons kort na my aankoms nog lesings gedurende Juliemaand in Pretoria moes aanbied vir studente, en dat daar met groot moeite afsonderlike klasse vir blankes, swartes, 'Asiate' en 'kleurlinge' aangebied moes word. Party van hierdie lesings het ek in my kantoor aangebied vir slegs twee of drie studente.

Unisa het gedurende die dertig jaar wat ek hier gewerk het, natuurlik baie verander. Tot 1989 was die regs fakulteit nog in wat bekend gestaan het as die ou Samuel Pauwgebou in die middestad, op die hoek van Skinner- en Van der Waltstrate. Ons het maar selde by die 'Nuwe Jerusalem', soos skertsend na die indrukwekkende nuwe Unisagebou op Muckleneukrand verwys is, gekom. Die manlike dosente was almal stemmig gekleed in das en baadjie, en die senaatsvergaderings het die mans almal ewe vroom met pakke klere bygewoon. Die biblioteek, toe reeds baie goed toegerus, was 'n doodstil plek waar 'n mens ure kon deurbring met navorsing. Ons het dikwels tee gedrink in een of ander teedrinkplek in die middestad. Een so 'n plek was in 'n arkade wat in Schoemanstraat geleë was, en by die ingang van die arkade was daar aan die een kant 'n winkel wat godsdienstige literatuur verkoop het, en aan die ander kant een wat grafstene verkoop het. Ek onthou nog goed hoe Sas by die ingang van die arkade altyd met sy hand na hierdie twee winkels gewys het en gesê het: 'Hiër berei jy jou voor vir daár!'

### **Onderrig aan Unisa en navorsing**

In die loop van die dertig jaar wat ek aan Unisa verbonde was, het ek gesien hoe die studiemateriaal baie verbeter het. Studiegidse het byvoorbeeld baie meer gebruikersvriendelik geword. Studentegetalle het egter die hoogte ingeskiet, wat 'n swaar las op dosente geplaas het, veral gedurende eksamentye. Ofskoon dit verblydend is om die sterk groei in studentegetalle te merk, is dit 'n kommer dat soveel studente wat nie in hulle moedertaal studeer nie, dit baie moeilik vind om hulle korrek en behoorlik uit te druk. Ek vermoed dat die standaard van taalonderrig op skool, en veral op sekondêre vlak, nie baie goed is nie en een van die hooforsake vir hierdie probleem is.

Na my mening was die LLB-kursus wat die studente vroeër jare geneem het, 'n kursus wat hulle 'n beter regskwalifikasie gebied het as die LLB-kursus wat die universiteite tans aanbied. Die vroeëre LLB-kursus het 'n minimumstudie van vyf jaar behels, en studente moes, voordat hulle vir LLB kon inskryf, eers 'n Baccalaureus - graad slaag. Hierdie studente se taalvaardighede was beter as

vandag se LLB-studente, en hulle het in die algemeen ook 'n breër agtergrondkennis van die geesteswetenskappe gehad as vandag se studente.

Ek is ook van mening dat die LLM-graad wat studente tans kan behaal deur bloot eksamens te skryf, sonder om enige verhandeling te skryf, 'n te maklike meestersgraad-kwalifikasie is. Studente behoort, ten einde 'n meestersgraad te behaal, na my mening minstens 'n verhandeling te skryf wat die produk van selfstandige navorsing is, en waarin hulle gedwing word om hulle gedagtes samehangend in aanvaarbare stellings te formuleer. Ongelukkig is dit nie tans die geval nie.

Drie dekades gelede toe ek by Unisa begin werk het, was die klem in navorsing op die sogenaamde 'swartletter reg' ('black-letter law'), dit wil sê die reg soos wat dit in werklikheid is, in teenstelling tot die reg soos wat dit behoort te wees. Met die politieke en staatkundige veranderinge wat veral sedert 1990 ingetree het, het die klem verskuif na grondwetlike onderwerpe en, daarmee saam, menseregte. Ofskoon hierdie staatkundige veranderinge natuurlik verwelkom moet word, wonder ek tog of daar nie tans te veel gepubliseer word oor menseregte en verandering van die reg en die maatskaplike bestel nie. Baie artikels wat oor hierdie onderwerpe handel, word dikwels gekenmerk deur spekulatiewe redenasies oor redelik vae onderwerpe. Miskien is dit weer tyd om meer aandag te wy aan die konkrete onderwerpe. Wat die strafreg meer in besonder betref, is daar op die gebied van die besondere misdade sommer baie onderwerpe wat met vrug van naderby ondersoek kan word.

Dit is opmerklik dat daar die afgelope tyd betreklik min akademici is wat hulle in hulle navorsing toelê op die materiële strafreg. Hierdie verskynsel kan moontlik toegeskryf word aan die invoering van die Handves van Regte in die nuwe Grondwet, wat gelei het tot 'n groot belangstelling in konstitusionele strafprosesreg – 'n afdeling van die reg waaroor daar wel die afgelope tyd heelwat geskryf word. Daar is na my mening nog baie ruimte vir verdere navorsing in die materiële strafreg.

Die studie van die strafreg het my nog altyd baie na aan die hart gelê. Een van die redes hiervoor is die universaliteit van die probleme of onderwerpe van veral die algemene leerstukke van die strafreg. Ongeag die onderwerp in die algemene leerstukke wat 'n mens ondersoek, is daar altyd veel daaroor te lees in die literatuur oor die ooreenstemmende onderwerp in ander lande. Die strafreg leen hom by uitnemendheid tot regsvergelijkende ondersoeke.

Na my mening openbaar die strafreg in Suid-Afrika, vergeleke met die strafreg in ander lande, 'n groot leemte deurdat dit nie gekodifiseer is nie. Tot tyd en wyl ons strafreg gekodifiseer is, kan die legaliteitsbeginsel in die strafreg nie tot sy reg kom nie. Ek het my eie kodifikasie van die strafreg gepubliseer en volstaan



met die argumente ten gunste van kodifikasie wat ek in die voorwoord van hierdie publikasie geskryf het.

### **Die krisis in die strafregpleging**

As ander mense vir my vra wat die vakgebied is waarin ek 'n professor is, en ek 'die strafreg' sê, volg daar gewoonlik 'n kreun of een of ander uitdrukking van die ander persone waaruit dit duidelik blyk dat hulle nie veel van my vakgebied dink nie. Die rede hiervoor is die misdaadgolf wat gedurende rofweg die afgelope dekade en 'n half oor Suid-Afrika spoel, en die oënskynlike onvermoë van die strafregstelsel om dit hok te slaan.

Hierdie is nie 'n gepaste geleentheid om my opinie oor die oorsake van die huidige misdaadgolf te bespreek nie. Ek het die reeds in my boeke oor die strafreg (en meer bepaald in my bespreking van die strafteorieë) gedoen. Soos dit tans in Suid-Afrika aangaan, is ons besig om die stryd teen misdaad te verloor. Daar kan baie redes hiervoor aangevoer word, maar onder die vernaamstes is die onvermoë en onbevoegdheid van 'n te klein polisiemag, asook die afskaffing van die doodstraf deur die Konstitusionele Hof in *Staat v Makwanyane* 1995 3 SA 391 (KH); 1995 2 SASV 1 (KH). Hoe goedbedoel hierdie uitspraak ook was, het die geskiedenis bewys dat dit verkeerd was. Nog nooit in die vredestrydse geskiedenis van Suid-Afrika was die waarde van die menslike lewe laer as sedert in die invoering van die 'reg op lewe', die begrip 'sanctity of human life' en gepaardgaande daarmee, die afskaffing van die doodstraf nie. Hierdie stelling is nie 'n eie subjektiewe, persoonlike of selfs ideologiese opinie nie. Dit is 'n koue statistiese feit. Ek gee nie te kenne dat daar iets verkeerd is met die Handves van Regte en die reg op lewe daarin vervat nie. Na my mening het die Grondwetlike Hof in *Makwanyane* se saak egter die Handves verkeerd vertolk. Meer gedetailleerde motivering vir hierdie standpunt kan in my handboek oor die strafreg gevind word, en ek bly by hierdie standpunt.

Die hoewe het ook in hulle benadering tot strafoplegging na my mening die afgelope paar dekades te veel waarde geheg aan die relatiewe strafteorieë soos afskrikking en hervorming ten koste van vergelding, of soos hierdie teorie in politiek meer korrekte taal deesdae in Amerika genoem word, 'verdiende loon' ('just desserts').

### **Afrikaans as regstaal**

Dit is vir my jammer om die afgelope tyd te merk hoe Afrikaans as regstaal verwaarloos word. Afrikaanse regsakademies skyn meer en meer onwillig te wees om in hulle eie moedertaal te skryf en verkies om eerder in Engels te skryf. Ek vind hierdie verskynsel bejammerend. Om in Afrikaans te skryf is nie 'n teken van politieke verkramptheid nie. Die Afrikaners kan daarop trots wees dat

hulle, anders as ander taalgemeenskappe buite Engels, deur die jare 'n eie vaktaal en regsterminologie geskep het. Selfs regstydskrifte wat voorheen byna uitsluitlik Afrikaanse artikels gepubliseer het, se inhoud is deesdae byna uitsluitlik in Engels. As ek so voorbarig mag wees om 'n voorstel te maak oor hoe om Afrikaans as regstaal beter te beskerm, sou dit wees om voor te stel dat iemand die voortou neem om 'n nuwe regstydskrif genaamd 'Die Afrikaanse Regstydskrif' te stig.

### **Belangstelling buite die reg**

Wat my belangstellings buite die reg betref, het die akademiese lewe my 'n relatiewe vryheid gebied het om allerhande ander belangstellings te volg.

Ek hou baie van reis, binne sowel as buite Suid-Afrika.

Ek lees graag, en wat ek lees sou ek nie beskryf as 'populêre leesstof' nie. Ek het nog altyd baie belanggestel in filosofie, en lees graag boeke daaroor. Moontlik het hierdie belangstelling van my ook 'n invloed op my geskrifte oor die strafreg gehad.

Sedert my hoërskooldae het ek 'n groot liefde vir klassieke musiek – Schubert se 'Du holde Kunst'. Benewens om daarna te luister oor die radio of op CD's, hou ek ook van goeie klassieke musiekkonserte. Ek speel self 'n bietjie klavier, meestal klavierduette of komposisies vir twee klaviere saam met my vrou. Ek speel ook tjello, en het in die verlede in amateur-simfonie-orkeste soos die Johannesburgse simfonie-orkeste en die Universiteit van Pretoria se simfonie-orkeste gespeel. Tans is ek 'n lid van 'n kamermusiekgroep wat kamermusiek soos trios, kwartette of musiek vir ander kombinasies van instrumente speel. Na my aftrede neem ek ook soms waar as orrellis in verskillende kerke. Dit is nogal lekker om na my aftrede om nege-uur op 'n Maandagmôre nie op kantoor hoef te worstel met een of ander lastige administratiewe probleem in verband met afstandsonderrig nie, maar in plaas daarvan in 'n dolleë kerk agter die orrel in te skuif en te oefen aan 'n Bach koraalvoorspel!



Carel Rainier Snyman 17.12.1940



1946



1954



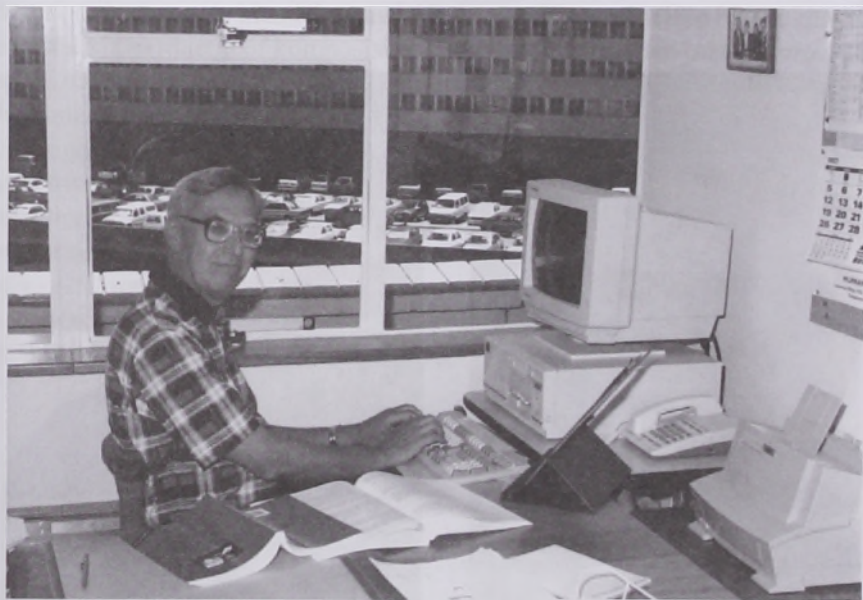
BA 1961



2007



Tydens 'n navorsingsbesoek by die Max-Planck-Institut Für ausländisches und internationales Strafrecht, Freiburg im Breisgau, Duitsland, 1973



Op kantoor in die Departement Staf- en Prosesreg, Universiteit van Suid-Afrika





Vakhoof van die Strafrekvakgroep, Departement Straf- en Prosesreg, saam met  
 voor: Proff Sunette Lötter, Louise Jordaan en Karin Alheit  
 agter: Advv Abel Ramolotja en Loutjie Coetzee



... du holde Kunst ...



Met eggenote Fernanda, dogter Marina en seun Rainier



# Money to be paid to a tsunami relief fund as a condition of a suspended sentence or as a fine in traffic offences

Peet M Bekker<sup>\*</sup>

## HULDEBLYK

*Ek ken Kallie persoonlik sedert 1975. Ons het vir 18 jaar binne loopafstand van mekaar gewoon en sedert 1977 vir 13 jaar daaglik per bus Unisa toe en terug gery!*

*Dit is 'n groot plesier om iemand soos Kallie persoonlik te ken en ook om saam met hom te werk. Hy is 'n goeie vriend en kollega. Dit is so geruststellend om Kallie in die omgewing te hê want geen probleem in die strafreg kon hom ooit onderkry nie. Hy word inderdaad as een van die grootste kenners op die gebied van die strafreg beskou. Sy werk Strafrege/Criminal law word as gesaghebbend beskou en is 'n ontontbeerlike bron wat onder andere in die biblioteek van elke hof in die land aangetref word.*

*Saam met sy uiters bekwame en aangename eggenote, Fernanda, was Kallie deur die jare 'n groot bate vir Unisa.*

## GENERAL BACKGROUND

The tsunami that struck several countries in the Indian Ocean area on 26 December 2004 is believed to have killed more than 220 000 people and left more than one million homeless. Relief funds were established, among others, by the Scottburgh Rotary Club. A Scottburgh magistrate took a bold, innovative and controversial step in ordering fines imposed by him to be donated to this Tsunami Relief Fund. Later he diverted a total of R44 500 in fines to the fund run by the local Rotary Club. Some time later the same court imposed a fine of R22 000 which was also given to the Rotary fund. In the same court an accused pleaded guilty to cheque forgery and was fined R 22 000, payable to the fund. In another case a person who was trapped driving at 220 km/h in a 100 km/h zone and who allegedly attempted to evade arrest, appeared in the same court pleading not guilty. The state entered into a plea bargain with the accused. He was offered a suspended sentence on condition that he pay a portion of the fine to the tsunami relief effort. The accused accepted and the magistrate fined him R 20 000 or one year's imprisonment which was suspended for five years on

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condition that he was not caught speeding again during the period of suspension, and that he pay R 8 000 to the Scottburgh Rotary Tsunami Relief Fund – which he did. The magistrate said that every other traffic offender after that entered into a plea bargain with the state and offered their fines to be paid to the same relief fund, to which the magistrate agreed. Another person who was caught speeding at 184 km/h, was fined R15 000 (or sixth months' imprisonment) suspended for five years on condition he pay R5 000 to the fund. An attorney was caught driving at 172 km/h and was fined R4 000, also suspended on condition that he pay R4 000 to the fund.<sup>1</sup>

## SUSPENDED SENTENCES<sup>2</sup>

### Definition

A suspended sentence is a sentence which has been imposed, in all the detail that is required for the proper imposition of such sentence, but of which the operation is suspended for a specified term, subject to the offender fulfilling the conditions on which the suspension has been based. A sentence that is wholly suspended is not executed unless the conditions for its suspension are broken by the offender. Sentences can also be partly suspended. In such cases the unsuspended part is executed, but the suspended part not – unless the conditions are not complied with.<sup>3</sup>

### The statutory provision for suspended sentences

A court may suspend any sentence except for an offence in respect of which any law prescribes a minimum punishment,<sup>4</sup> but this is largely negated because section 297(4) still allows for the partial suspension of such punishment. Even though the Act does not provide for other exceptions, two more have received some attention. The first is if a particular statute specifically excludes the suspension of any portion of a sentence imposed in terms of that statute. A second potential exception results from mandatory punishment, although Terblanche is of the opinion that, as long as there is no express provision to the contrary, even a mandatory punishment can be suspended.<sup>5</sup>

### Sentences which may be suspended

Section 297(1)(b) of the Act simply states that the court may pass sentence and then suspend it. It neither specifies nor limit these sentences. It is fair to assume that all sentences which a court may impose are included. There is no doubt that sentences consisting of ordinary imprisonment and fines can be suspended.<sup>6</sup> The maximum term for which a sentence may be suspended is five years. In the Free State exceptional circumstances are required before the maximum of five years

<sup>1</sup>This happened at the beginning of 2005. See *The Sunday Tribune* 23 January 2005 page 1.

<sup>2</sup>I make full use of Terblanche *The guide to sentencing in South Africa* (1999) 412 *et seq*, as well as Hiemstra/Kriegler *Suid-Afrikaanse straffproses* (6ed) 750 *et seq*.

<sup>3</sup>JJ Joubert *Criminal procedure handbook* (7ed 2005) 291.

<sup>4</sup>Section 297(1) of the Criminal Procedure Act 51 of 1977 – hereafter referred to as the Act.

<sup>5</sup>Terblanche n 2 above at 413–4.

<sup>6</sup>*Id* at 413.



is employed,<sup>7</sup> but this is not required in the other divisions.<sup>8</sup> The Free State point of view gives the impression that it is unreasonable to expect of people not to commit crime, a view that cannot be supported.<sup>9</sup>

### The decision to suspend sentences

The decision whether to suspend the imposed sentence or not is part of the sentence discretion of the trial court.<sup>10</sup> Suspended sentences have two main functions:

- (1) to serve as alternative to imprisonment in situations where the offender cannot afford a fine and where other forms of punishment are improper, mainly because the offence was not particularly serious; and
- (2) to serve as an individual deterrent to the offender since it is in effect, a sword over his head.<sup>11</sup>

### The purpose of suspending sentences

The purpose which the court wishes to achieve through the suspension of the sentence is an important consideration in the decision to suspend the sentence. It should always be a realistic purpose such as deterrence and rehabilitation.<sup>12</sup> One of the earliest reported judgments on the question of the purpose or the effect of suspended sentences is that by Hawthorn JP in *Persadh v R*:<sup>13</sup>

Ordinarily [a] suspended sentence has two beneficial effects: it prevents the offender from going to gaol ... The second effect of a suspended sentence, to my mind, is of very great importance. The man has a sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself he will have to serve it. That there is a very strong deterrent effect cannot be doubted.

With this background in mind, the purposes of a suspended sentence can now be discussed.<sup>14</sup>

#### *Individual deterrence*

There is little doubt that the suspension of an imposed sentence on a negative condition (see below) has one major overriding purpose, namely to act as individual deterrent on the offender.<sup>15</sup> Du Toit<sup>16</sup> considers prevention to be one of the purposes of a suspended sentence. He argues that the 'first offender can usually be prevented from repeating his criminal conduct because he has a

<sup>7</sup>*S v Nabote* 1978 1 SA 648 (O).

<sup>8</sup>*S v Cobothi* 1978 2 SA 749 (N); *S v Van Rensburg* 1978 4 SA 481 (T).

<sup>9</sup>Joubert n 3 above at 291–292.

<sup>10</sup>*S v Herold* 1992 2 SACR 195 (W).

<sup>11</sup>*S v Allart* 1984 2 SA 731 (T).

<sup>12</sup>*S v Roscoe* 1990 2 SACR 125 (W) 129b–c.

<sup>13</sup>1944 NPD 357 358.

<sup>14</sup>I can do no better than to quote extensively, sometimes verbatim, from Terblanche n 2 above at 417–419 and Joubert n 3 above at 291–293.

<sup>15</sup>See eg *S v Dreyer* 1990 2 SACR 445 (A) 448d.

<sup>16</sup>*Du Toit et al Commentary* 28–42B.

sentence hanging over him.' Prevention in this sense is nothing other than individual deterrence, since a suspended sentence cannot actually prevent an offender from re-offending. It is often said that this suspended sentence hangs over the head of the offender like the proverbial 'sword of Damocles'.<sup>17</sup>

### *Mitigation of sentence*

Mitigation of sentence is the second purpose of suspended sentences. It has been well summarised by Cloete J in *S v Herold*:<sup>18</sup>

It is equally the purpose of a suspended sentence to prevent, where this can legitimately be done, a productive member of society being sent to prison or a particular offender (especially a young offender) being exposed to the undesirable influence of hardened criminals.

### *Rehabilitation*

The purpose of suspending a sentence is to ameliorate the sentence with mercy (compassion) with the view to rehabilitating the offender. This happens with the expectation that the offender will follow the correct course while carefully observing the suspended sentence.<sup>19</sup>

### *Suspension of lengthy term of imprisonment*

It is generally inappropriate to suspend long terms of imprisonment in conjunction with long terms of effective imprisonment.<sup>20</sup>

It is also inappropriate to impose a long term of imprisonment, and then to suspend it, or most of it.

## **THE CONDITIONS OF SUSPENSION**

When considering the conditions of suspension it is useful to distinguish between *negative* and *positive* conditions (even though our courts do not use this distinction, but see Hiemstra and Kriegler 754). *Negative conditions* are the most common conditions and require of the offender not to repeat the crimes specified. They are called 'negative' because they do not require any positive action by the offender, only the requirement that he/she refrains from doing something criminal. *Positive conditions* however, require positive action on the part of the offender in order to fulfil the conditions of suspension; examples are payment of compensation or performing community service. In other words, the offender is required to do something positive in order to prevent the suspended sentence from being carried out. When positive conditions are imposed, they are usually combined with a negative condition also.<sup>21</sup>

<sup>17</sup>Terblanche n 2 above at 417.

<sup>18</sup>1992 2 SACR 195 (W) 1971-J.

<sup>19</sup>*S v Allart* 1984 2 SA 731 (T) 733H.

<sup>20</sup>*S v Mhlakaza* 1997 1 SACR 515 (SCA) 524b.

<sup>21</sup>Terblanche n 2 above at 292; 413.



Examples of positive conditions include compensation, community service, correctional supervision, submission to instruction or treatment and the attendance of courses or treatment at specified centres.

### Statutory provision

A sentence may only be suspended if such suspension is subjected to 'any condition referred to in paragraph (a)(i) (of section 297)'. Without a condition the suspension is incomplete and improper. The conditions mentioned in the Act are both specific and general.

#### *Specific conditions*

These are:

- (1) Compensation (subparagraph (aa))
- (2) Benefit or service in place of compensation (subparagraph (bb))
- (3) Community service (subparagraph (cc))
- (4) Correctional supervision (subparagraph (ccA))
- (5) Submission to instruction or treatment (subparagraph (dd))
- (6) Submission to supervision by probation officer (subparagraph (ee))
- (7) Attendance of or residence at a centre of some kind (subparagraph (ff))

#### *General conditions*

These are:

- (1) Good conduct (subparagraph (gg))
- (2) *Any other matter* (subparagraph (hh)), the latter being a free discretion for the court in relation to sentencing and the conditional suspension of sentence.<sup>22</sup> This discretion is very wide indeed but it must be interpreted in the spirit of the preceding paragraphs and take into consideration the fact that the conditions must be related to the offence in question.<sup>23</sup>

### Requirements for conditions in general

#### *Introduction*

The *locus classicus* with regard to the requirements which conditions of suspension should meet, is *R v Cloete*.<sup>24</sup> Reynolds J stated:

(Two) principles at least should be observed. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of a suspended sentence. It need not be closely related but should be related to it in some degree at least, even though slightly related, and not divorced from it. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition.

Any condition of suspension has to conform to three basic requirements:

<sup>22</sup>*Du Toit* 375–6.

<sup>23</sup>*Hiemstra/Kriegler* 761.

<sup>24</sup>1950 4 SA 191 (O).

- (1) It must be related to the committed offence.
- (2) It must be stated clearly and unambiguously.
- (3) The conditions must be reasonable.<sup>25</sup>

*(1) It must be related to the offence in question*

Any condition must have some relation to the crime for which the accused was convicted and it was again emphasised that conditions of suspension should not be framed too widely.<sup>26</sup> Generally this requirement has been used to determine which crimes a negative condition should be made subject to. No direct connection is required, with the result that the conditions need not be restricted only to the crime for which the offender has been convicted. Whether a condition is sufficiently related is a matter of 'logic and equity'.<sup>27</sup> Various attempts have been made to define this relationship more clearly, eg by stating that it must be 'material',<sup>28</sup> but generally such definitions have not lasted.<sup>29</sup>

In *S v Stanley*<sup>30</sup> it was decided that there must be 'a rational and causal connection between the offence and the damage in respect of which the compensatory order is made'. Nor must it be so wide that it has no nexus with the offence concerned.<sup>31</sup> Where a suspended sentence is imposed subject to the condition that the accused not again be convicted of an offence of which dishonesty is an element, the condition of suspension is too vague.<sup>32</sup> In *S v Grobler*<sup>33</sup> it was decided that conditions of suspension should not be unduly onerous and should remain reasonably possible for the accused to comply with. On the other hand, there is every reason to impose a condition covering any future commission of common assault where the accused was convicted of common assault but the sentence was suspended on condition only that he was not convicted of assault with intent to do grievous bodily harm.<sup>34</sup> In *S v Tsanshana*<sup>35</sup> a term of imprisonment imposed for theft was suspended on condition that the accused not be convicted of an offence of which dishonesty is an element and committed during the period of suspension. It was held that the condition was cast too widely and that it should be amended to 'that the accused is not convicted of theft or attempted theft committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine'.

<sup>25</sup>Joubert n 3 above at 292–3.

<sup>26</sup>*S v Mjware* 1990 1 SACR 388 (N) 389q.

<sup>27</sup>*S v Stanley* 1996 2 SACR 570 (A) 574a-b.

<sup>28</sup>*S v Radebe* 1973 3 SA 940 (O).

<sup>29</sup>*S v Van den Berg* 1976 2 SA 232 (T) 234 H; *S v Tshaki* 1985 3 SA 373 (O) 376G–J and the cases referred to there.

<sup>30</sup>1996 2 SACR 570 (A).

<sup>31</sup>*S v Maluleke* 1977 4 SA 545 (T).

<sup>32</sup>*S v Goeieman* 1992 1 SACR 296 (NC).

<sup>33</sup>1992 1 SACR 184 (C).

<sup>34</sup>*S v Louw* 1992 1 SACR 688 (Nm). Also see *S v Titus* 1996 1 SACR 540 (C).

<sup>35</sup>1996 2 SACR 157 (EC).



(2) *The conditions must be stated clearly and unambiguously*

The condition must be clear and the accused should know exactly what conduct may lead to his having to serve the sentence.<sup>36</sup> It is undoubtedly more clear to specify the crimes which an accused should not repeat rather than to use phrases such as 'crimes of which force is an element'; 'crimes of which dishonesty is an element'<sup>37</sup> or 'crimes for which theft is a competent verdict'.<sup>38</sup>

In *S v Point Blank Promotion CC*<sup>39</sup> the court referred to unnecessary and very onerous conditions including reference to a number of offences involving petty offences. The conditions were set aside.

Where the condition is related to prevention of criminal conduct by the accused, it should be made clear that a conviction of an offence committed within the period of suspension will break the condition.<sup>40</sup>

The condition must not be such that it can be breached by some occurrence outside the control of the accused,<sup>41</sup> nor should it be breached by a petty contravention (which may bring into operation a heavy sentence).<sup>42</sup>

A suspended sentence must be such that the magistrate thinks it will probably be put into force and which he/she thinks can justifiably be put into force if the conditions for suspension are breached. What is of cardinal importance is that the suspended sentence must be an appropriate sentence for the offence committed.<sup>43</sup>

The determination of what the accused had to do in order to avoid the sentence being carried out should be determined by the court and not left to the discretion of, for example, a probation officer.<sup>44</sup>

A condition of suspension stipulating that the accused has to submit an essay on the evils of an offence (eg shoplifting) gives rise to a number of problems and a sentence that contains such a condition is normally not a proper sentence.<sup>45</sup>

(3) *The conditions must be reasonable*

In addition to the two requirements which stem from *S v Cloete*<sup>46</sup> another requirement has developed over the years. This requirement is that the suspending conditions have to be reasonable. In essence this means that they

<sup>36</sup> *S v Xhaba* 1971 1 SA 232 (T); *R v Cloete (supra)* 192; *S v Valashia* 1973 3 SA 934 (O).

<sup>37</sup> *S v Mjware* 1990 1 SACR 388 (N); *Goeieman* 1992 1 SACR 296 (NC).

<sup>38</sup> See Terblanche n 2 above at 426.

<sup>39</sup> 1996 2 SACR 275 (T).

<sup>40</sup> *S v Malgas* 1979 3 SA 178 (A)181; *S v Xhaba* 1971 1 SA 232 (T).

<sup>41</sup> *S v Gaika* 1971 1 SA 231 (C).

<sup>42</sup> *S v Allart* 1984 2 SA 731 (T).

<sup>43</sup> *S v Schultz* 1991 1 SACR 679 (E).

<sup>44</sup> *S v Cronje* 1991 2 SACR 619 (C).

<sup>45</sup> *S v Mbola* 1992 2 SACR 175 (E).

<sup>46</sup> See note 23.

should be formulated in such a manner that they will not cause future unfairness or injustice. This means, *inter alia*, that compliance with the conditions should not be outside the control of the accused<sup>47</sup> and should be reasonably possible for the offender to comply with and not be too onerous.<sup>48</sup> The conditions should also take into account human fallibility.<sup>49</sup>

The conditions should not be worded in such a way that a petty offence may trigger a severe suspended sentence. In several cases the accused was convicted of dealing in dagga and sentenced to a (partially) suspended term of imprisonment on condition that, *inter alia* the accused was not found guilty of the possession of dagga. One can hardly argue that these two offences are not sufficiently related, but possession of a minute amount of dagga would normally breach the conditions upon which the (usually) severe sentence for dealing in dagga was suspended. For this reason it has become customary to include an extra condition for the latter offence, such as 'for which imprisonment, without the option of a fine, of more than four months is imposed'.<sup>50</sup>

## Fines

According to s 90 of the National Road Traffic Act, No 93 of 1996, all fines imposed or moneys estreated as bail in respect of any offence in terms of that Act shall be paid into the appropriate accounts as determined by the laws of each province.

Except in cases where statutory authority exists for such an order, a court is not entitled to direct that any portion of the fine go to the complainant in the case or to an informer or anybody else. The fine must go to the state.<sup>51</sup>

## CONCLUSION

### Suspended sentences

The applicable general condition for the relevant suspended sentence is '**any other matter**' – see s 297(1)(a)(i)(hh) of the Act. It creates a free discretion for the court to conditionally suspend a sentence and the condition must be related to the offence in question. As a requirement for conditions in general the condition of suspension must also be related to the offence in question.<sup>52</sup> It is submitted that there is no relationship between a traffic offence in South Africa and the tsunami of 2004. As was stated by Kessie Naidu, former chairman of the Road Accident fund:

While it is worthy to make a contribution to the Tsunami Relief Fund, I am certain there are deserving organisations in South Africa that deal with

<sup>47</sup> *S v Gaika* 1971 11 SA 231 (C) 232A–B.

<sup>48</sup> *S v Grobler* 1992 1 SACR 184 (C) 185i–j.

<sup>49</sup> *S v Allart* 1984 2 SA 731 (T) 736A; *S v Herold* 1992 2 SACR 195 (W) 198j.

<sup>50</sup> *S v Adams* 1986 3 SA 733 (C); *S v Herold* 1992 2 SACR 195 (W), and see Joubert n 3 above at 292.

<sup>51</sup> Joubert n 3 above at 285.

<sup>52</sup> See the text next to footnotes 22–23 and 24–35.



victims of road accidents, which would have been a more relevant cause to contribute to.<sup>53</sup>

**Fines**

It is submitted that it is also irregular to order that a fine should not go to the state but to a relief fund.<sup>54</sup>

<sup>53</sup>See article in *Sunday Tribune*, 23 January 2005 1.

<sup>54</sup>See text accompanying footnote 51.

# A saga of snitches and whistleblowers: the boundaries of criminal liability for breach of statutorily-imposed duties especially in the context of organised crime

Jonathan Burchell\*

It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing his duty is too harsh for man. (Justice Marshall in *Marbury v Brooks* 20 US 556 at 575–6 (1822).)

## Introduction

The common law, both in its civil and criminal form, has always been reluctant to extend the boundaries of liability to include failures to act or speak. To a large extent the motivation for this reticence is to maximise the liberty of the individual who fails to act or speak, allowing him or her to remain supine or silent in certain circumstances – but also acknowledging that in different, exceptional instances the law might compel action or speech.

The divide between Anglo-American and Continental jurisprudence on liability for omissions reflects a fundamental difference of approach to the nature of law itself. The Anglo-American system of tort and criminal law developed from a premise that law essentially prohibits one from causing harm to another, including the state, and generally does not require one to benefit another. Continental systems tend to approach the problem from the perspective of altruism or beneficence, requiring positive duties in more circumstances than their Anglo-American counterparts and recognising the confluence of law and morality.<sup>1</sup> While South African law, influenced by Anglo-American legal philosophy, has tended to follow the approach to liability for omissions that maximises individual liberty at the expense of altruism, there are signs that the list of exceptional duties to act or speak is

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<sup>1</sup>Jonathan Burchell & John Milton *Principles of criminal law* (3ed 2005) 187.



being judicially expanded in the civil law and legislatively extended in the criminal sphere. This development has unfortunately occurred in a piecemeal fashion.

The Constitutional Court and the Supreme Court of Appeal in South Africa have recently broadened the base of civil liability by imposing duties on the state to protect persons from violent crime and human rights abuses.<sup>2</sup>

At the same time, the legislature has been busy extending statutory duties, especially in the context of the fight against organised crime, corruption and terrorism and has in the process imposed criminal liability, often carrying severe penalties, on ordinary persons for failing to act or to speak. The focus of this article is on a critical evaluation of these newly imposed statutory duties and how they encourage a culture of informing and how they in fact threaten fundamental principles underpinning the common law. The article attempts to develop theoretical and policy reasons for distinguishing the commendable recent judicial imposition of positive duties on the state to protect others from violent crime and human rights abuses from the less defensible legislative imposition of positive duties on ordinary citizens to assume the role of the state in protecting it and others from organised crime. In the process, a distinction emerges between what Garland calls the 'responsibilization strategy'<sup>3</sup> (whereby the state invokes the assistance of non-state organisations and individuals to assist in the fight against crime and where the watchwords are 'partnership' and 'cooperation')<sup>4</sup> and the transfer of state functions in criminal detection to civil society under threat of criminal sanction.

These new reporting duties that appear in legislation designed to combat organised crime and corruption epitomise the insidious relocating of the burden of crime investigation and detection onto the shoulders of the ordinary citizen. It might be argued that in this way the primary duty in the detection and prosecution of crime that rests on the state is shared with the individual. Compulsory enlisting of the assistance of citizens in the fight against organised crime on pain of criminal sanctions is clearly distinguishable from the voluntary cooperation of citizens in community policing endeavours. It is, perhaps, understandable that a state that has limited resources to deal with all manifestations of crime will try to enlist the help of its citizens in the detection of crime on a voluntary basis – it is

<sup>2</sup>See generally Burchell & Milton n 1 above at 188, 191–4, 196–205 and the cases discussed there. The survey in the work was written before judgment was delivered by the Constitutional Court in *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC). This judgment confirms the 'accountability' of government as the basis for the extension of this legal duty on the part of the state.

<sup>3</sup>D Garland 'The limits of the sovereign state: strategies of crime control in contemporary society' (1996) 36 *British Journal of Criminology* 445 at 452.

<sup>4</sup>See also Valsamis Mitsilegas *Money laundering counter-measures in the European Union – a new paradigm of security governance versus fundamental legal principles* (2003) 12 and 151–4.

another matter for the state to punish its citizens with the full force of the criminal law if they do not provide the appropriate level of assistance. If one wants to widen the chasm between the state and the individual in the matter of crime control, the imposition of criminal sanctions against those who refuse to speak out against their fellow citizens is a very effective way of doing so.

The most debatable strategy is where the state imposes often severe criminal sanctions on private organisations and ordinary persons for failing to report criminality or suspected criminality to the police (sometimes based on a negligence fault element) rather than encouraging voluntary vigilance and engaging the private sector in a collaborative venture in combating crime. Even if reliable evidence sufficient to reinforce a prosecution for money laundering could be secured by this heavy-handed means of compelled reporting (and statistics indicate that the contrary is true),<sup>5</sup> the price paid for interfering with confidentiality and privacy would be far too high.

Legal duties to act or speak can never be considered in isolation. Even if a legal duty to act or speak were to be imposed, whether by statute or common law, liability for its breach would only follow if the other elements of civil or criminal law were established. This means that in many cases, a causal link between omission and unlawful consequence would have to be established and fault in the form of intention or negligence would have to be proven. Causation and fault provide additional limiting devices that serve to curtail the scope of criminal or civil liability within reasonable proportions. If, for instance, statutory liability is imposed for failing to report to the police, or some other public authority, the suspicion that a crime might be or has been committed, then if this liability is not dependent on proof of a *causal link* between the failure to act or speak and the commission of the offence and is, furthermore, not dependent on proof of an *intentional or deliberate* failure to report but is, at most, based on a *negligent* failure to report, these limiting devices are absent or at least diminished.<sup>6</sup> Should such open-ended individual liability be countenanced by a system of criminal (or even civil) law that should be based on maximising individual freedom of action and fundamental rights? Does one's civic duty extend to being an informer? It is debatable whether it should but, even if it does, should criminal breach of this duty extend to *negligent* conduct when a breach of the duty to report is the sole determinant of the *actus reus*?

<sup>5</sup>See the data cited by Mitsilegas n 3 above which indicate that although the number of reports of money laundering is high, the translation of this evidence into actual convictions is disappointingly low.

<sup>6</sup>It is interesting to note that even Pamela H Bucy, a proponent of imposing enforceable legal duties on private individuals to report transactions over a certain financial limit in the fight against money laundering, advocates that this duty only apply in cases where there is clear proof of *intentional* wrongdoing: 'Epilogue: the fight against money laundering: a new jurisprudential direction' (1993) 44 *Alabama LR* 839 at 861. See further, below, where the argument for an intention-based liability for failure to report is developed.



Section 34 of the Prevention and Combating of Corrupt Activities Act<sup>7</sup> imposes a duty on certain persons to report corrupt practices; section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act<sup>8</sup> imposes a duty on a person, who has reason to suspect that another intends to commit, or has committed, a 'terrorist' offence or is aware of the presence at any place of a person who is so suspected of intending to commit or having committed such offence to report the suspicion to the police; and section 29 of the Financial Intelligence Centre Act (FICA)<sup>9</sup> imposes a duty on a person who carries on a business or who is employed by a business to report suspicious or unusual transactions regarding the proceeds of unlawful activities. Not only is the imposition of criminal liability for such omissions in the above statutory instances highly contentious, but the potential linking of liability to *negligent* failures to act or speak is doubly contentious. This article both challenges the practice of suggesting negligence as the fault basis for criminal liability in these new statutory duties imposed on individuals and questions the overall legal justification for compelling ordinary persons, under threat of the criminal sanction, to become agents of the state.

Before critically evaluating the precise formulation of the new statutory duties, the scene needs to be set by highlighting the reasons for the underlying antipathy of the general public and the law to 'informers'.

### The semantic scene

Words such as 'snitch',<sup>10</sup> 'grass', 'rat' and 'squealer' reveal the disdain with which not only the criminal fraternity, but also the general public, regards the informer. An allegation that a person is an informer may even be defamatory.<sup>11</sup> The rather more neutral term 'informer' itself carries unpleasant connotations, often linked to the exchange of money for information.<sup>12</sup> The evolution of the Zulu word *phimpi* (meaning a species of cobra) to '*impimpi*' (informer) would appear to chart a not inappropriate derivation and one that carries considerable apartheid baggage.<sup>13</sup>

More recently, the term 'whistleblower' has come into vogue, perhaps in an attempt to restore some respectability to the conduct of the informer or, at

<sup>7</sup>12 of 2004, which came into force on 27 April 2004.

<sup>8</sup>33 of 2004, which came into force on 20 May 2005.

<sup>9</sup>38 of 2001, which came into force on 3 February 2003.

<sup>10</sup>The noun 'snitch' is probably derived from the underworld slang meaning 'the nose' and the verb 'snitch' is a variant of 'snatch' meaning to 'steal, pilfer': *Online etymological dictionary*. In terms of prisoners' slang 'snitch' means 'An informant. rat': a *prisoner's dictionary* <http://dic-tionary.prisonwall.org/>, accessed 21 October 2005.

<sup>11</sup>See JM Burchell (1974) 91 *SALJ* 178 at 192–5.

<sup>12</sup>John Ellison Kahn *et al* (eds) *The right word at the right time – a guide to the English language and how to use it* 291.

<sup>13</sup>*The Truth and Reconciliation Commission of South Africa Report* (1998) contains reference to the fact that during apartheid '[t]argets of attack were repeatedly people seen as linked to the apartheid system (councillors or their families, police, sell-outs) and invariably rumoured to be, or identified – whether justifiably or not – as *impimpis* (informers)'.

least, to attempt to show that the disclosure is linked to warning the authorities of some potential illegality that can possibly be prevented by the disclosure. However, there is little doubt that reporting the activities of another to the police, whether these activities are criminal, merely suspected of being criminal or innocent, carries connotations of some underhanded behaviour. In fact, any potential justification for reporting actual or supposedly illegal conduct to the authorities is stronger where the conduct reported is unanimously considered criminal in nature. Justification for reporting conduct which is not uniformly regarded as criminal (or where the clear-cut definition of the illegal nature of the conduct is less obvious) is more contentious. Justification for reporting to the authorities apparently innocent conduct that *might* lead to illegal behaviour is also difficult to justify.<sup>14</sup> Any stain attaching to the informer attaches even if the reporting is unremunerated although in practice such reporting is often rewarded in some way.

At best, the attitude of the criminal justice system to informers is ambivalent.<sup>15</sup> Like the use of criminal traps they are seen in some instances as a necessary evil in the fight against crime. But, even in those cases where the pragmatic justification for the use of informers might be seen as strong, any benefit in encouraging informers to disclose information must be weighed carefully against the disadvantages of disclosure to society and possibly the pursuit or the vocation of the informant. Furthermore, the imposition of a duty to speak enforced by criminal law sanction must be regarded as a last resort and, even where exceptional circumstances impelling such duty exist, proof of *intentional* failure to disclose must be established.

In short, the activities of the snitch, the 'grass' or 'impimpi' is often not only frowned upon by society but even subjected to physical retribution or retaliation. The unenviable Hobson's choice facing individuals in South African society, in the context of the legislation reviewed in this article, is stark: comply with one's statutory obligations to inform on suspected criminal activities but ultimately face potential extra-legal retaliatory vengeance from society generally; alternatively, remain loyal to one's fellow citizens and breach the statutory duty of disclosure so running the risk of conviction of a criminal offence and sentence to a hefty fine or imprisonment for a considerable period.

<sup>14</sup>The law of defamation recognises this by regarding an allegation that someone has reported apparently innocent conduct to the authorities as a clearer impairment of the alleged informer's reputation than where the informer is alleged to have informed the authorities on clearly criminal conduct: see JM Burchell (1974) 91 *SALJ* 178 at 192-5. An instance of a duty to report on innocent (as well as possibly criminal activity) is that which might be imposed on accountable and reporting institutions by s 28 of the Financial Intelligence Centre Act 38 of 2001 to report cash transactions over a certain prescribed limit. This section has been passed by the legislature but a date has not yet been set for its implementation.

<sup>15</sup>Gerard E Lynch 'The lawyer as informer' (1986) *Duke LJ* 491.